IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

MASSACHUSETTS BONDING AND INSURANCE COMPANY,
Petitioner,

vs.

THE WINTERS NATIONAL BANK AND TRUST COMPANY OF DAYTON, OHIO, as Administrator de bonis non with will annexed of the Estate of Robert Chambers, Deceased,
Respondent.

BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Comes now, The Massachusetts Bonding & Insurance Company, petitioner herein, and in support of its petition for a writ of certiorari to the United States Circuit Court, Sixth Circuit, submits the following brief.

OPINION BELOW

The opinion, of the Court below, is reported in Massachusetts Bonding & Insurance Co. vs. The Winters National Bank & Trust Company of Dayton, Ohio, 130 Fed. (2d.), Page 5; the decision of the Ohio Appellate Court, in the state proceeding, may be found in Re The Estate

of Chambers, 16 O. O., 519, 36 N. E. (2d.), 175; 32 O. L. Abs.—252; Motion to certify overruled, 136 O. S. 202, 24 N. E. (2d.), 601.

JURISDICTION

The judgment of the Court below was entered October 6, 1942. The jurisdiction of this Court is invoked under Judicial Code, note 240, as amended.

STATEMENT OF THE CASE

We have previously submitted to the Court, under our summary statement of issues, contained in the petition for the writ, a concise statement of the history of this case. For brevity, we re-submit the summary statement of issues (Petition, P. 2), in addition to the following.

It is the claim of the respondent, the obligee, that its predecessor embezzled $17,717.00 of the estate funds, and then died by his own hand. Irrespective of the actual amount of the loss, the obligee desires a judgment against your petitioner for $30,372.58. It arrived at this exorbitant figure by adopting the method of filing exceptions to the tenth and final account of the principal, and opening up two old partial accounts which had been settled and approved and became res judicata by final judgment. After it had opened those old accounts, it had the Probate Court order the deceased principal to return the Administrator's fees, which the Probate Court had allowed him at the time those accounts were filed. In addition, interest was added to those fees from the date of withdrawal. It is the claim of the respondent that the judgment settling the two prior accounts was vacated for the reason that the principal did not have the cash on hand that he fraudulently charged himself with in the "Balance on hand" of his said account.

Your petitioner claims that a period of over two years before the principal died had elapsed since he filed and

had approved and settled his ninth account, and that the statute and the Supreme Court of Ohio hold that no Court has "jurisdiction" to set aside, on the ground of fraud, such a judgment after two years from the date it was entered. Therefore, it is incumbant upon the respondent to start with the balance the Administrator charged himself with at the conclusion of the ninth accounting period, to determine if there was estate funds missing; that if there was embezzlement, such fact must be alleged and it must prove the embezzlement constituted a breach of the bond, as well as the loss occasioned by such breach, which would be, in this event, the sum of $17,717.00; and that any claim for the difference between the judgment sued on, in the case at bar, and the actual amount embezzled, would represent special damages or penalties, which would necessitate specific allegations in the pleading, and proof to determine that it was covered under the terms of the bond. Likewise it is true that if there were any other acts of the deceased principal, which constituted a breach of the bond, they must be specifically alleged and proved, and any loss occasioned thereby would be an additional amount of recovery on the bond. This is the only method provided by the statutes, and the Supreme Court of Ohio, to permit a succeeding Administrator to recover on a bond.

It is the claim of the respondent that it need not allege or prove any breach of the bond, but may predicate its action on the judgment which it had recovered in an ancillary proceeding commenced in the Probate Court against the deceased Administrator, after his death, and in which this surety, as well as the Administrator of the principal's non-existent estate, were made parties. In that proceeding the respondent prayed to have an accounting

on the amount of assets charged to Mr. Harshman at the time his ninth account was settled; to vacate the prior judgment settling the eighth and ninth account of the principal and to cause him to return compensation previously approved and allowed him; and to assess interest as damages on the compensation, as well as all withdrawals. No judgment was recovered against the surety, in the proceeding on exceptions, but the respondent did obtain a judgment against the deceased Mr. Harshman "or" his Administrator.

It was further offered by the respondent that it was not necessary for it to allege or prove any acts which constituted a breach of the bond, and resulting loss thereunder, and that it is immaterial whether the Probate Court had jurisdiction of the subject matter when it vacated the eighth and ninth judgment, for the reason that that Court and the Court of Appeals of Montgomery County both determined that it did have jurisdiction, irrespective of the fact that the Supreme Court of Ohio hold that a void judgment may be collaterally attacked.

SPECIFICATION OF ERRORS

I. The application of the doctrine of res judicata has deprived your petitioner of its defenses to litigate on its bond.

II. The Court below is in conflict with the U. S. Circuit Court of Appeals for the Fourth, Fifth and Eighth Circuits. Where a different proof is required to sustain the two actions, a judgment in one is no bar to the other.

III. The Circuit Court of Appeals did not follow the law pronounced in *West* v. *Am. Tel. & Tel. Co.*, 311 U. S. 223.

ARGUMENT

Specification of Errors No. 1

THE APPLICATION OF THE DOCTRINE OF RES JUDICATA HAS DEPRIVED YOUR PETITIONER OF ITS DEFENSES TO LITIGATE OF ITS BOND.

To consider this most important question, it is necessary to examine the pleadings in the State Court, as well as in the case at bar.

As previously pointed out, the respondent commenced the ancillary and special proceedings in the Probate Court by the filing of exceptions to the tenth and final account of the deceased Administrator. Therein it prayed as follows:

> "charging the estate of Daniel I. Harshman, deceased, and the surety upon the official bond of Daniel I. Harshman, etc., with the principal amount of said shortage, to-wit: $17,717.98." (R. 149.)

In addition to the amount of the actual loss as indicated in the foregoing prayer, the respondent also prayed for penalties for the use of said funds as indicated in the exceptions. (R. 144-148-151-153.)

Your petitioner twice attacked the jurisdiction of the Court over the subject of the action and the person of the surety by demurrer, and the Probate Court, as well as the Common Pleas Court overruled the same (R. 154-155, 193-194), holding that it had jurisdiction to determine a cause of action on the surety bond in such ancillary proceedings, irrespective that the Supreme Court of Ohio had definitely held that a surety was neither a necessary or proper party in summary proceedings by way of exceptions to an account, and had no standing or right in such matters.

> "The surety on the bond was not a party to that proceeding and he had no right to be." *Smith* v. *Rhodes,* 68 O. S., 505."

No judgment was rendered against the surety in the proceedings below. The judgment of the Probate Court, as amended, reads as follows:

> "The Court further finds that there is due and owing from said Deniel I. Harshman, deceased, or his estate, to The Winters National Bank & Trust Company of Dayton, Ohio, the immediate successor to Daniel I. Harshman, as Administrator d.b.n.w.w.a. of the estate of Robert Chambers, deceased, the sum of $30,372.58, with interest on $20,433.00 thereof at the rate of six per cent per annum from October 1, 1939, until paid." (R. 193)

The petition of respondent, in the case at bar, alleged specifically the proceedings had in the State Court, the judgment of $30,372.58 it received against the deceased principal or his estate, and prayed for a like judgment against the petitioner. (R. 26)

It will be observed that the petition does not contain an allegation as to specific breach of the bond, the actual amount embezzled or a separate claim for damages in the nature of the penalties found against the deceased principal or his estate in addition to the loss.

The Federal Trial Court held:

> "The only condition of the bond alleged is that Harshman should administer the testator's property according to law and the will of the testator. The only breach of the bond alleged is the failure to pay the amount so found due by the Probate Court." (R. 51)

We urged to the Circuit Court below, that if respondent had sued the surety, on its bond for a breach thereof,

as a separate issue in the State Court, as indicated by its prayer, that it was not successful therein, and it could not split a cause of action and bring the action at bar to collect the amount that had been previously determined. (See Petition for Rehearing R. 367 to 382.) The Circuit Court held as follows:

> "The determination of the liability of the Administrator while a prerequisite to this suit on the bond, is no part of the cause of action against the surety itself",

and further held,

> "While appellee in its exceptions in the Probate Court prayed for judgment against the surety, the prayer was not a proper part of the exceptions to the account and in no way constituted a suit on the bond. The Probate Court entered no judgment against the surety and treated the prayer for such relief as *surplusage*. The judgments of the higher state courts likewise, covered the liability of Harshman only." (R. 366)

It follows, therefore, that if the respondent did not sue the surety on its bond in the State Court and thereby split its cause of action, and the State Court treated the prayer as surplusage and further that the action on exceptions was merely a prerequisite to determine the amount Mr. Harshman may have been short before bringing an action on the bond, that the issues such as might be raised by an action for a breach of the bond, charging embezzlement and actual loss, and claiming penalties allowed in the State Court, was never determined by the State Court, and constitutes an entirely different cause of action, claim or demand.

It is a well settled principle of law that where the second action, between the same parties, is upon a differ-

ent claim or demand, or cause of action, that the judgment in the first action operates as an estoppel only as to the point or question actually litigated and determined.

Davis v. *Brown,* 94 U. S. 43.
Cromwell v. *Sac County,* 94 U. S. 351.
Bissell v. *Spring Valley Twp.,* 124 U. S. 225.
Nesbitt v. *Riverside Independent,* 144 U. S. 610.
McComb v. *Frink,* 149 U. S. 629.
Last Chance Mining Co. v. *Tyler,* 157 U. S. 683.
Roberts v. *Northern Pacific Ry.,* 158 U. S. 1.
Werlein v. *New Orleans,* 177 U. S. 390.
Virginia-Carolina Chemical Co. v. *Kirven,* 215 U. S. 252.
George A. Fuller Co. v. *Otis Elevator,* 245 U. S. 499.
Myers et al v. *International Truck Co.,* 263 U. S. 64.
Larsons v. *North Land Transit Co.,* 292 U. S. 20.

Effect on the Surety

By holding that the entire state proceedings were res judicata as to this surety and the bringing of an action on the judgment instead of on the bond, the surety could offer no defenses, and was thereby deprived of its day in court in violation of Article XIV of the Constitution, guaranteeing protection to petitioner of its properties, and Article I, Section 10, impairing the obligation to contract.

In analysis, it must be remembered that the actual amount the Administrator embezzled and which was proven was $17,717.00, whereas the judgment now affixed against it is for over $30,000.00 and includes interest charged back beyond old judgments and disallowance of previously allowed compensation.

If the action had been brought on the bond, necessity would require, in proper pleading, that the actual amount embezzled be set forth and the surety charged with the

specific breach of the bond in such amount. Likewise it would be necessary to *separately* claim the recovery of the penalties allowed by the State Court against the deceased Administrator or his estate for the $13,000.00, was a breach of the bond and proffer a provision of the contract covering that amount. Proof would follow to necessitate a judgment in the total amount. The surety would be permitted to offer in defense whatever might be available to it towards the original claim of the amount embezzled of $17,717.00. Most important it would be permitted to set forth Statutes of Ohio in Limitation to the claim of penalty, which reads:

> "Personal use of trust property prohibited. No fiduciary shall at any time, make any personal use of the funds or property belonging to the trust, and for any violation of this provision, he shall be liable and also his bond in an action for any loss occasioned by such use and for such additional amount by way of penalty not exceeding the amount of the loss occasioned by such use as may be fixed by the court hearing such cause. Such amounts shall be payable for the benefit of the beneficiary, if living, and to his estate if he be deceased."
>
> *Section 10506-47, General Code.*

> "Limitation of action. Any action under the next preceding section shall be brought not later than one year after the termination of the trust or the discovery of the fact of such loss."
>
> *Section 10506-48, General Code.*

The loss was first discovered in the estate on March 24, 1936 (R. 97).

This section was not considered by the Trial Court nor by the Circuit Court below on the ground that the respondent, from the nature of the issues raised by its plea on the judgment, was not seeking a penalty (R. 51-70, 363).

Of the $13,000.00 in penalties, approximately $8,000.00 represents compounded interest from back as far as 1928 on the various withdrawals and disallowed compensation.

An important fact is that first demand was made upon the surety on December 11, 1939 (R. 20).

It is a well settled principal of law that a surety whose undertaking obligated it contingently for unliquidated damages, is not considered in default until notice or demand, and interest does not begin to run until then. *U. S. v. Quinn,* 122 Fed. 65.

This Court in *Curtis* v. *U. S.,* 100 U. S. 119, in an action against sureties of a paymaster in the army, assigned as the breach of the conditions of his official bond that he did not when thereunto required, refund $3,320.02, with interest. He rendered his account November 30, 1865, when he left the service, and shortly thereafter died. On the subsequent adjustment of his account that sum was found due at said date. No demand therefor was made of his personal representative, and the sureties had no notice of the claim before service of the writ in the action. The adjustment was the only evidence of the sum due. Held: that the U. S. is entitled to recover that sum, but with interest only from the date of such service.

In Re: *Perelson,* 44 Fed. (2d.) 62, it was held that a surety for a Trustee was chargeable with interest on a defalcation only from the time the principal was cited for contempt, and when it failed to make good after the defalcation had been called to its attention.

In *Black Diamond Steamship Corp.* v. *Fidelity & Deposit Company,* 33 Fed. (2d) 767, it was held:

> "The principal may be liable at all events and, before compliance with the conditions, the interest on

his obligation may run from the time of his default. Interest against the surety should be calculated only from the time the surety is in default and he should not be considered in default until the conditions have been met and his liability determined and made known to him."

In *Massachusetts Bonding* v. *U. S.*, 97 Fed. (2d.), P. 379, the Court held:

> "A surety is required to do nothing until notified by the obligee of the principal's default but, if upon such notice surety unjustly withholds the amount, he is liable for interest at ordinary rate because of unjust retention of money."
>
> "Where performance is to be rendered on demand or any other condition precedent, interest as damages will not begin to run until demand or until occurrence or excuse of the condition." Restatement of Law of Contracts, 337.

It is very readily determined the prejudicial effect upon the surety in claiming res judicata because it was a party to the proceedings in the State Court to determine the amount of Mr. Harshman's shortage, and in this action for the recovery of the amount to be paid under the terms of the bond.

If the issues were properly joined in an action upon the bond against the surety, it would have a right to have legally determined by the Federal Courts whether or not Section 10506-47-48 G. C. estopped the respondent from recovering anything more than $17,717.00, or the actual amount embezzled. Likewise, it would have available to it as a defense, that a surety is not chargeable for interest until after formal demand is made and it then arbitrarily refuses to pay. At any rate, it could not be held for interest compiled some ten years before the actual loss was discovered and inquiry made into it.

It is also well settled that a principal may be charged with a great deal more than could be recovered on his surety bond.

> "A principal in a bond may be liable beyond the stipulations of the instrument, independently of the bond, but so far as his liability is in consequence of the bond and by force of its terms, his surety is bound with him." *Stovall* v. *Banks,* 10 Wallace, 583-588.

By this erroneous application of the law, the surety has been assessed $13,000.00 without being permitted to defend on the subject or issues.

Specification of Errors No. 2

THE COURT BELOW IS IN CONFLICT WITH THE U. S. CIRCUIT COURT OF APPEALS FOR THE FOURTH, FIFTH AND EIGHTH CIRCUITS. WHERE A DIFFERENT PROOF IS REQUIRED TO SUSTAIN THE TWO ACTIONS, A JUDGMENT IN ONE IS NO BAR TO THE OTHER.

Bitner v. *West Virginia Pittsburgh Coal Co.* (Fourth Circuit) 15 Fed. (2d.) 652.
Kelliher v. *Stone and Webster,* (Fifth Circuit) 75 Fed. (2d.) 331.
Water, Light & Gas Co. v. *City of Hutchinson,* (Eighth Circuit) 160 Fed. 41.
Harrison v. *Remington Paper Co.* (Eighth Circuit) 140 Fed. 385.

There can be no question but what an action on the bond requires different proof, for the issues are likewise not the same as in a special proceeding to determine if an Administrator is short in his accounts and how much.

The Circuit Court below is in direct conflict with the cases set forth above, since it held that we were concluded by the determination of the probate Court, irrespective of the fact of whether we were a formal party to the settlement proceedings or not. (R. 364)

Specification of Errors No. 3

CIRCUIT COURT OF APPEALS DID NOT FOLLOW THE LAW PRONOUNCED IN WEST v. AM. TEL. & TEL. CO., 311 U. S. 223.

The Court below held that it was bound by the decision in the West case to follow the decision of the Court of Appeals rendered in the state action, (R. 363) and for this reason could not determine whether or not the State Courts had jurisdiction to vacate the Ninth Account Judgment.

It is our impression that the law as pronounced in the West case, is that Federal Courts are required to follow the law of the state as announced by the legislature or by the highest court of the state. In the absence of a statute or a decision of the Supreme Court of the state, it may then ascertain from all available data what the state law is and may consider the decisions of inferior courts.

Section 10501-17 G. C. of Ohio, provides:

> "The Probate Court shall have the same power as the Common Pleas Court to vacate or modify its orders or judgments."

Section 11631 G. C. of Ohio, provides:

> "That the Common Pleas Court may vacate its own judgments or orders after term 'for fraud practiced by the successful parties in obtaining a judgment or order.'"

Section 11640 G. C., provides that such a proceeding to vacate or modify a judgment or order as specified in Section 11631, "must be commenced within two years after the judgment was rendered or order made."

Section 10506-40 G. C., is similar to 11631 G. C., insofar as vacating judgment for "fraud" is concerned. One

applies to the Common Pleas Court, and the other to the Probate Court, but neither describe how or under what circumstances a judgment may be vacated for fraud.

Section 11640 G. C. is a part of "the grant of jurisdiction." This is the law of Ohio as provided by statute. It has been construed by the Supreme Court of Ohio in *Errett* v. *Howert,* 78 O. S., 109.

> "A probate Court, after term, loses jurisdiction over its judgments and does not again acquire jurisdiction to vacate the same on the ground of fraud, except within the time and manner provided by statute. Such a time limit is a limit on the grant of jurisdiction, and not simply a defense."

The Circuit Court below ignored *Errett* v. *Howert,* after holding that it did not apply because it is a guardianship case. The law announced in that case is general and applies in all actions.

> "It is the policy of the law that all controversies should reach speedy determination. The peace of society demands that the judgment of every court having jurisdiction of a cause should be a final adjudication of that cause unless it is reversed or vacated in the manner and by the methods provided therefore." *Crawford* v. *Zeigler,* 84 O. S., 224-231.

The Supreme Court of Ohio in *Eichelberger* v. *Gross,* 42 O. S., 549-554, announced that the law of Ohio to be:—

> "That a partial account is conclusive unless attacked in the mode provided by law."

No court has any "power" to vacate such a judgment in any manner other than provided by a statute. *Huntington* v. *Finch,* 3 O. S., 445-447.

It follows that the law announced by the Court of Appeals in the state action is only "datum" to be observed

by the Federal Court only when there is no statute or State Supreme Court pronouncement of the law on the subject. The Circuit Court of Appeals, therefore, erred when it accepted as the law announced in the Chambers estate, supra, to be "The Law of Ohio."

The effect of this holding, by the Court below, permits to be added to the actual amount embezzled by the principal, previously allowed compensation, which was approved when he filed his ninth account, and interest on withdrawals of his eighth account in 1928, and interest as well on the compensation, in this event about $4,500.00.

SUMMARY

We respectively submit that for the apparent errors of the courts below as set forth in the Petition for Writ of Certiorari and this supporting brief, your petitioner has been prejudicially deprived of substantial justice in the premises entitled to be heard on the merits by this Honorable Court.

Respectfully submitted,

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